

**ISPs v. AOL**  
**Version 5.0 Litigation**

EX PARTE OR LATE FILED

Yates and Schneider  
Attorneys at Law  
Two Professional Drive  
Suite 228  
Gaithersburg, Maryland 20879  
Telephone: 301-519-0040  
Facsimile: 301/519-8155  
writer's Direct Dial: 301-938-2201  
E-Mail: kyates@erols.com  
Web-address: ComputechLaw.com

Kenneth F. Yates:  
Maryland Bar  
District of Columbia Bar  
Virginia Bar

Fritz Schneider:  
Maryland Bar  
District of Columbia Bar

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Jeffrey Kim:  
Maryland Bar

Of Counsel:  
Cheryl Flax-Davidson  
Florida Bar  
New York Bar

November 6, 2000

Ms. Magalie Roman Salas  
Secretary Federal Communications Commission  
445 12<sup>th</sup> Street, S. W. – The Portals  
TW-B204  
Washington, D.C. 20554

Re: America OnLine, Inc. and Time Warner Inc.  
Ex Parte Presentation  
Applications of America OnLine, Inc. and Time Warner Inc.  
For Transfers of Control,  
CS Docket No. 00-30

Dear Ms. Salas:

On behalf of a nationwide class of internet service providers (ISPs), submitted herewith are an original and one copy of this notice regarding permitted oral ex parte presentation in the above-referenced proceeding. On November 3, 2000, Kenneth Yates, Esq. and Douglas Brooks, Esq. representing the plaintiff ISPs in a nationwide class action lawsuit, met with members of the Commission's staff, at their request, to discuss aspects of the merger of America OnLine (AOL) with Time Warner Inc.

Attending the meeting on behalf of the ISPs were Kenneth Yates and Douglas Brooks.

The following FCC personnel attended: Michael Kende, Office of Plans & Policy; James Bird, Office of General Counsel; Sherille Ismail, Darryl Cooper, and Royce Dickens, of the Cable Services Bureau.

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The following is a synopsis of the meeting:

**It is openly acknowledged that internet service providers ("ISPs") future existence, as a viable competitive force in the internet marketplace, depends on access to high-speed "broadband" technology. Cable access is a key component. The problems created by America OnLine (AOL) Version 5.0 software are directly related to this "open access". AOL guarantees of "open access" to its competitor-ISPs are meaningless if the competitor-ISPs' software is shutdown by AOL at the user's computer terminal, before access is ever gained to the cable "superhighway".**

The Senate Judiciary Committee felt this issue was significant enough to question Steve Case directly regarding the Version 5.0 litigation in opening hearings on the AOL/Time Warner merger.

Kenneth Yates, of the Maryland firm of Yates and Schneider, and Douglas Brooks, of the Boston Massachusetts firm of Gilman and Pastor are the lead counsel in class action litigation between the 8000 nationwide ISPs and AOL regarding AOL's Version 5.0 software. The lead plaintiffs CapuNet LLC and Galaxy Internet Services are class representatives acting on behalf of ISP's throughout the country. In addition, more than 50 class actions have been brought nationwide on behalf of the 10 million consumers affected by this Version 5.0.

**The core issue in this litigation is the adverse effect that AOL Version 5.0 internet software has upon competitor ISPs' internet software already installed on their customer/consumers' computers. AOL Version 5.0 disables competitor ISPs' software, denying customer/consumers the use of that software, and further changes the default internet settings on their customer/consumers' computers, replacing themselves as the default ISP without either the customer/consumers' knowledge or consent. The new AOL version 6.0, which has just been released by AOL this past week, is being tested to see if it also creates problems such as created by Version 5.0.**

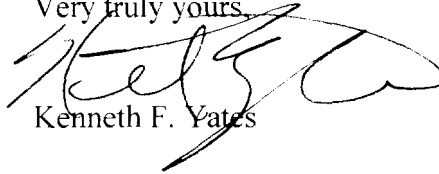
The ISP's very existence, their ability to compete with AOL as a real market force and their customer's freedom of choice of the internet are directly threatened as a result of this behavior by AOL. If it is allowed to continue after the merger with Time Warner, it will spell the end of competitive ISP's.

**Legally enforceable guarantees of "open access" must also include legally enforceable guarantees that AOL will do nothing to interfere with customer/consumers' operation of competitor ISP connections to the Internet, and further that customer/consumers' choice of "default internet" settings on their computers will not be changed by AOL without their knowledge and consent.**

AOL has already acknowledged that its Version 5.0 software does replace itself as the default ISP without notice to the consumer. (AOL does give the consumer a choice of a default setting for web-page, e-mail and newsgroups).

Kindly direct any questions regarding this matter to the undersigned.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Yates', written over the typed name.

Kenneth F. Yates

Cc: Michael Kende

James Bird

Sherille Ismail

Darryl Cooper

Royce Dickens

Linda Senecal

Douglas Brooks

Attachments: Handout - Exhibits 1-6

Video – Exhibit 7

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In the matter of

Application of America OnLine, Inc. and  
Time Warner Inc. for  
Transfers of Control

CS Docket No. 00-30

Ex Parte Submission brought on  
Behalf of Non-AOL Internet Service Providers

AOL's Version 6.0 Software Is the Internet Equivalent Of "Slamming" –  
Without the Computer User's Consent or Knowledge  
AOL replaces Its Competitor's Internet Connection  
With AOL as the Primary Internet Connection

Kenneth F. Yates, Esq.  
Yates and Schneider  
Suite 228  
Two Professional Drive  
Gaithersburg, Maryland 20878  
Telephone: 301-519-0040

Douglas Brooks, Esq.  
Gilman and Pastor  
Stonehill Corporate Center  
999 Broadway  
Suite 500  
Saugus, Massachusetts 01906

Counsel in America OnLine Version 5.0 Litigation:  
CapuNet, LLC, et. al. v. America OnLine  
and  
Galaxy Internet Service v. America OnLine.

November 9, 2000

**AOL's VERSION 6.0 SOFTWARE IS THE  
INTERNET EQUIVALENT OF "SLAMMING"  
Without the Computer User's Consent or Knowledge  
AOL replaces Its Competitor's Internet Connection  
With AOL as the Primary Internet Connection**

**INTRODUCTION**

At the request of the Federal Communications Commission, on November 3, 2000, Kenneth F. Yates, Esq. and Douglas Brooks, Esq. made an oral presentation regarding the disabling effect of America OnLine (AOL) Version 5.0 on competitors' internet software installed on the same computer.

As part of that presentation, Yates and Brooks advised that preliminary tests were being conducted on the newly released AOL Version 6.0 software to determine if it acted in a like manner. Those tests have been concluded, and **it is clear that AOL Version 6.0 acts in an illegal fashion similar to Version 5.0: without the consumer/user's knowledge or consent, it alters settings on consumer/users' computers, to replace the user's chosen primary Internet Service Provider ("ISP"), with AOL as the primary ISP. The competitor ISP therefore losses the significant advantage of being the coveted "first screen" or "start screen" the user sees when he logs onto the internet. Instead he sees AOL as the "first screen" or "start screen".**

**This is the internet equivalent of the now outlawed "slamming" techniques employed by long-distance phone companies in replacing themselves as the long-distance carrier, without the consumer's knowledge or consent.**

AOL's continued illegal conduct underscores the need for the Federal Communications Commission to address this conduct as part of its review of the cable license transfer of the Time Warner cable network to AOL control. It is fundamental that

“open access” requires all internet service competitors to have equal access to the high-speed cable “superhighway”. To ensure that this goal is realized, AOL must discontinue its practice of closing the “on ramp” to that “superhighway, by altering computer settings so as to disengage its competitors’ software, even before access to the cable “superhighway” is ever gained.

## DISCUSSION

One of the core issues involved in the Version 5.0 litigation is the surreptitious manner in which AOL alters the settings on a user’s computer to designate itself as the primary or “default” ISP, replacing the user’s already chosen primary ISP – a competitor of AOL. This choice by the individual computer user of its primary ISP is set out in the “dial-up connection” in the computer’s “control panel”. There an ISP is designated as the primary ISP by being listed as the “default” internet connection.

As part of the Version 6.0 installation, AOL modifies this “default” internet connection by replacing itself as the “default” or primary ISP, without the consumers/user’s knowledge or consent. Whenever the consumer/user logs onto the internet, rather than seeing **his selection** of a primary ISP as the “first screen”, the connection is made through AOL, and instead, the consumer/user sees AOL selection with AOL as the “first screen”. The competitor ISP therefore loses the “first screen” or “start screen” competitive advantage, to their damage and detriment.

Although AOL argues that replacing the original primary ISP is simply a matter of a few clicks of the mouse on the computer, for the technologically unsophisticated computer user, switching back to their original ISP is daunting. The user has to go into the control panel of their computer to make the change. For the average user, just

clicking into the control panel of a computer is a venture into the unknown, which can cause more problems than it solves. This has a significant chilling effect upon the user's willingness to switch back to their original ISP.

As a result, most consumer/users continue to log onto the internet through AOL, who now enjoys the competitive "first screen" advantage over their vastly smaller competitor ISPs.

**THIS CONDUCT BY AOL VIOLATES THE  
COMPUTER FRAUD AND ABUSE ACT, 18 U.S.C.A SECTION 1030**

This conduct by AOL violates the Computer Fraud and Abuse Act, §1030, which prohibits the unauthorized modification of computer settings, without the computer owner's knowledge or consent. That statute was drafted to address computer hackers violations the integrity of individual computers. It applies to AOL as well.

AOL's prior internet software, Version 5.0, has been described as a "virus" and AOL's actions in distributing Version 5.0, have been called "hacking" by noted industry experts. (See Hand-out.. Exhibit 6 – statement of William Kirkner). Numerous tests on that software have clearly demonstrated the adverse effect, it has upon competitors' software installed on that same computer, similar to a computer virus.

Tests conducted on the recently released AOL Version 6.0 verify that this new software behaves in a similarly surreptitious and illegal manner. Without the individual user's knowledge or consent, AOL replaces that user's chosen "default" ISP with AOL as the "default" ISP. AOL does this by changing the dial-up setting on those computers in which it is installed along with a competitor ISP, as part of the installation of AOL Version 6.0, never giving the consumer/user a choice.



## **THE TEST**

The attached exhibits demonstrate an installation of AOL Version 6.0 on a computer which had already installed a competitor ISP as the primary or “default” ISP. “Erols Internet” is designated as the “default” internet connection in the “dial-up” settings on the computer. Exhibit “A”.

Thereafter Version 6.0 is installed on the computer. Exhibits “B”, “B-1” and “B-2”.

At no time during the installation of Version 6.0 does AOL ask the individual user to make whether the consumer/user desires that AOL become the user’s primary ISP.

The only choice the consumer/user is given is whether he/she desires that AOL become “your default Internet application for Web pages, newsgroups, and e-mail”. Exhibit “C”.

Choosing “yes” or “no” to that question makes not difference – in both instances AOL becomes the primary or “default” ISP.

In Exhibit “C”, the “yes/no” button was pushed “no”. Irrespective, AOL replaces itself as the primary ISP by becoming the “default” dial-up setting in the computers connection box. Exhibit “D”.

Similarly, when the “yes” button is pushed, Exhibit “E”, AOL again becomes the “default” ISP. Exhibit “F”.

( Interestingly, when the button is pushed “yes”, AOL goes even further than it advertises: it not only replaces itself as the internet application for Web pages,

newsgroups and e-mail, but it also reconfigures the computer browser, “Internet Explorer”).

### **AOL’s DEFENSE**

In open hearing before the Senate Judiciary Committee investigating the AOL/Time Warner merger, in response to inquiries by Senator Orin Hatch, Steve Case defended AOL’s action by stating that AOL gives consumers a “choice”. See Video attached as Exhibit “7”. AOL continues to propagate the claim that it gives consumers a choice; however, numerous live demonstrations have proven that the “choice” AOL refers to is **not** whether AOL should become the primary or “default” ISP, but something completely different: that choice is merely whether the consumer wants AOL to be the “default Internet application for Web pages, newsgroups, and e-mail”. See Exhibit “C”. This is nothing more than adding software on the computer similar to the e-mail program “Outlook Express”, and has nothing to do with which ISP is the primary ISP.

AOL has further stated in its defense that it is doing nothing different than the other major ISPs. It attempts to justify its action in altering this “default” dial-up setting to make itself the “default” ISP, to gain the coveted “start screen” or “first screen” advantage, by citing examples of MSN, Earthlink-Mindspring and others, who do likewise. However, AOL— which is ten times bigger than its biggest competitor and controls more than 50% of the market— should not be allowed to point to conduct of its vastly smaller competitors to justify its own illegal and reprehensible conduct. (Notably Prodigy and Juno do not conduct themselves in this manner.)

Like “slamming”, the fact that many others are conducting themselves in an illegal manner, does not, itself, justify such conduct.

## CONCLUSION

Now, with the release of Version 6.0 within the past week, and the demonstrably adverse effect it has upon its competitors, similar to Version 5.0, it is imperative that AOL guarantee that it will not obstruct "open access" to its cable network by impairing the quality or speed of its competitors' software. **At the threshold, AOL must address the problems caused by its Version 5.0 and 6.0 software. At a minimum, it must guarantee that it will modify its 6.0 software so it does not replace itself as the "default" ISP without giving users clear notice of their selection of AOL as the default ISP, and a choice as to whether they wanted to make this switch from their already selected primary ISP.** Given that Version 6.0 has just been released, this should be a simple matter to correct on future releases of Version 6.0.

Secondly, AOL must give guarantees that it will do nothing in the future to interfere with its competitors product installed on computers also using AOL or on computers accessing the Time Warner cable network.

EX PARTE OR LATE FILED

Yates and Schneider  
Attorneys at Law  
Two Professional Drive  
Suite 228

Gaithersburg, Maryland 20879

Telephone: 301-519-0040

Facsimile: 301/519-8155

Writer's Direct Dial: 301-938-2201

E-Mail: kyates@erols.com

Web-address: ComputechLaw.com

Kenneth F. Yates:  
Maryland Bar  
District of Columbia Bar  
Virginia Bar

Fritz Schneider:  
Maryland Bar  
District of Columbia Bar

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Jeffrey Kim:  
Maryland Bar

Of Counsel:  
Cheryl Flax-Davidson  
Florida Bar  
New York Bar

November 9, 2000

Ms. Magalie Roman Salas  
Secretary Federal Communications Commission  
445 12<sup>th</sup> Street, S. W. – The Portals  
TW-B204  
Washington, D.C. 20554

Re: Notice of Written Ex Parte Submission  
America OnLine, Inc. and Time Warner Inc. and  
Ex Parte Presentation  
Applications of America OnLine, Inc. and Time Warner Inc.  
For Transfers of Control,  
CS Docket No. 00-30

Dear Ms. Salas:

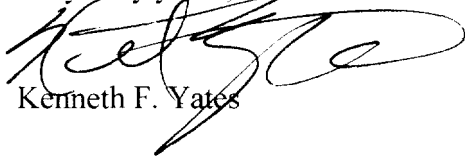
Attached hereto please find a re-submission of the synopsis of an Ex Parte Presentation that was forwarded to your office on November 6, 2000 on behalf of a nationwide class action brought by internet service providers. That letter inadvertently did not list the docket number, CS Docket No 00-30, which is now included.

Also attached is a written supplement to that Ex Parte submission, regarding AOL's new Version 6.0 software and it's discriminatory effect on other internet service providers.

If you have any questions, please do not hesitate to call me.

Thank you for your cooperation in this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. Yates', with a large, sweeping flourish at the end.

Kenneth F. Yates

Cc: Michael Kende  
James Bird  
Sherille Ismail  
Darryl Cooper  
Royce Dickens  
Linda Senecal  
Douglas Brooks, Esq.

W/attachements

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### Introduction and Case Status

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## INTRODUCTION

Kenneth Yates, of the Maryland firm of Yates and Schneider, and Douglas Brooks, of the Boston Massachusetts firm of Gilman and Pastor are the lead counsel in class action litigation between a nationwide group of Internet Service Providers (ISP's) and America OnLine (AOL) regarding AOL's Version 5.0 software. The lead plaintiffs CapuNet LLC and Galaxy Internet Services are class representatives acting on behalf of ISP's throughout the country.

**The core issue in this litigation is the adverse effect that AOL Version 5.0 internet software has upon our clients' internet software already installed on our customers' computers. AOL Version 5.0 disables that software, denying our customers the use of that software, and further changes the default internet settings on our customers' computers without their knowledge or consent. The new AOL version 6.0, which has just been released by AOL this past week, is being tested to see if it also creates problems such as created by Version 5.0.**

It is openly acknowledged that our client ISPs' future existence as a viable competitive force in the internet marketplace depends on access to high-speed "broadband" technology. Cable access is a key component. The problems of created by Version 5.0 are directly related to this "open access".

**Guarantees by AOL to its competitor ISPs of "open access" to the cable network of Time-Warner are meaningless, if our clients' customers are unable to turn on our clients' internet software, even before they attempt to log on to that high-speed cable network, as the result of AOL disengaging our clients' internet connections.**

**Legally enforceable guarantees of "open access" must also include legally enforceable guarantees that AOL will do nothing to interfere with the customers operation of our clients ISP connections to the Internet, and further that our customers' choice of "default internet" settings on their computers will not be changed by AOL without their knowledge and consent.**

The existence of the ISP's who compete with AOL and their customers' freedom of choice of the internet are directly threatened as a result of this behavior by AOL, which if allowed to continue after the merger with Time Warner will spell the end of competitive ISP's.

**The Senate Judiciary Committee felt this issue was significant enough to question Steve Case directly regarding the Version 5.0 litigation in opening hearings on the AOL/Time Warner merger. We urge the Federal Communications Commission to address as part of its review of the AOL/Time Warner merger.**

## STATUS OF LITIGATION

In October, 1999 AOL released its then latest internet software, Version 5.0. Immediately there were reports of serious adverse effects upon the operating systems of users computers. Among the more serious was the disabling of its competitors internet connections by AOL Version 5.0.

In January of this year, the first litigation regarding AOL Version 5.0, Khazai v. AOL was filed in Federal Court in the Eastern District of Virginia, by Yates and Schneider. This action was filed on behalf of consumers nationwide who had been adversely affected by 5.0. Subsequently more than 50 actions have been filed nationwide on behalf of consumers. All of the federal actions have been consolidated in federal court in Miami, Florida before Judge Gold.

A week after filing the first consumer action, Yates and Schneider filed a second action on behalf of the competitor ISPs in state court in Maryland. (tab 1). The judge in that case overruled AOL's motion to dismiss with respect to Count II of the complaint, but did state that the complaint should be amended to address the specific predatory actions of AOL which are deceptive and unfair and which violate computer crimes acts. (tab 2) The judge granted the motion to dismiss for Count I, with leave to amend. The complaint has now been amended for both counts as requested by the judge, and the litigation is ongoing.

The firm of Gilman and Pastor filed an action in federal court in the U.S. District Court for the District of Massachusetts on behalf of Galaxy Internet Services, Inc. against AOL for the same problems created by Version 5.0. (tab 3) (The Galaxy lawsuit was recently transferred to the Southern District of Florida, pursuant to an order by the Judicial Panel on MultiDistrict Litigation.)

Both CapuNet and Galaxy are "internet service providers" ("ISP") which provides both internet access service and email service to its customers. There are approximately 8,000 ISPs in this country, most of which are small, privately held businesses like CapuNet and Galaxy, with a few thousand or tens of thousands of subscribers. AOL is the largest ISP in the world, by far, with almost 25 million subscribers.

All of these actions allege the same fundamental facts and claims against AOL:  
When installed on personal computers, AOL Version 5.0 interferes with the ability of consumers to access ISPs other than AOL and replaces itself as the "default" ISP without the users knowledge or consent. (See tab 4 – testimony of computer expert, Theodore Grossman).

This has had an impact both on consumers who may wish to access other ISPs, and also upon ISPs, whose relationships with current and prospective customers have been damaged. This damage takes the form of both lost subscription revenues from customers who either terminate their subscriptions or do not enter into subscriptions, due to their inability to access the other ISPs, and a tremendous amount of time (and overtime) spent by



technical support personnel in attempting to resolve the problems caused by AOL Version 5.0 (since consumers typically do not know why they are having problems accessing a non-AOL ISP, they generally call the non-AOL ISP and expect that ISP to solve the problem).

**The key claims in the various lawsuit are as follows:**

#### **Attempted Monopolization of the Internet Service Market**

AOL is attempting to monopolize the internet service market, in violation of §2 of the Sherman Act, 15 U.S.C. §2, by designing and distributing software which interferes with consumer's access to other internet service providers. This is predatory conduct, done with the specific intent to monopolize the internet access market and, given AOL's 60% share of the market (10 times the share of its closest competitor), has a dangerous probability of successful monopolization.

**AOL has admitted that it continued to distribute Version 5.0 for 6 months from October, 1999 to May, 2000 after it was alerted by MicroSoft that Version 5.0 was incompatible with earlier version of Windows 95 and on May 10, 2000 agreed to a “stipulated order” in that regard. (See tab 5).**

#### **Computer Fraud and Abuse Act**

AOL violated the Computer Fraud and Abuse Act, 18 U.S.C. §1030, through its development and distribution of AOL Version 5.0. Specifically, it is alleged that AOL violated the following three subsections of this statute:

- \* Section 1030(a)(4), which prohibits both accessing a computer without authorization, or, with particular application to this case, exceeding authorized access with intent to defraud or obtain a thing of value.
- \* Section 1030(a)(5)(A), which prohibits knowingly causing the transmission of a program which damages a protected computer.
- \* Section 1030(a)(5)(B) and (C), which prohibits intentionally accessing a protected computer without authorization and thereby causing damage.

**Prodigy (whose name was invoked by AOL in the stipulated order, tab 5) Chief Technology Officer, William Kirkner has stated that Version 5.0 is a “virus” and that the effect of this software is equivalent to “hacking”. See tab 6.**